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Supreme Court, U.S.
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No. 03-0526

In The Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NEBRASKA, COLORADO, DELAWARE, MICHIGAN, MISSOURI, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Is the Sixth Amendment right recognized by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) so radically different from the Sixth Amendment right applied to capital cases in *Ring v. Arizona*, 536 U.S. 584 (2002), that radically different answers to the retroactivity of these two holdings can be justified?

Does the new rule announced by this court in *Ring* clearly fall within that exceedingly rare class of cases which so alter our understanding of American justice that it should be retroactively applied in the collateral review of judgments which became final prior to the release of the *Ring* opinion?

May a federal court interpret substantive state law in a manner contrary to the specific rulings of a state's highest court?

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STATEMENT OF AMICI INTEREST

The State of Nebraska and the 12 amici states have a strong interest in this Court granting the State of Arizona's petition for a Writ of Certiorari in this case for the following reasons.

- The Nebraska Supreme Court, the highest courts of four other states and two federal circuit courts have rejected arguments that this Court's ruling in *Ring* is to be applied retroactively. Thus, the Ninth Circuit's position in this case grants *Ring v. Arizona*, 536 U.S. 584 (2002) relief to an Arizona prisoner when a similar request for relief would be denied in numerous other jurisdictions in this country. That marked disparity in the application of our federal constitution is unacceptable.

- Nebraska and other states which had employed judicial sentencing in capital cases prior to *Ring* had for decades conducted potential capital cases to final judgment in good faith reliance upon this Court's holdings in *Profitt v. Florida*, 428 U.S. 242 (1976), and *Walton v. Arizona*, 497 U.S. 639 (1990). It would be a significant detriment to the states' interest in accurate fact finding, justice, society's perception of justice, and the finite resources of state legal systems, if cases tried and affirmed on direct review in reliance upon *Proffit* and *Walton* were now required to be re-opened.

- The finality of judgments is a significant aspect of the system of justice these states desire to provide their citizens. The Ninth Circuit's position in this case unnecessarily erodes that legitimate legal and societal goal.

- The Ninth Circuit's position founds its analysis upon an interpretation of substantive Arizona law which

directly conflicts with a specific ruling of the Arizona Supreme Court upon that exact question. States have a vital interest in having their highest courts be the final arbiters of substantive state law.

- The Ninth Circuit's ruling injects unnecessary doubt and confusion into the resolution of *Ring* claims in all jurisdictions.

- The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring* even in jurisdictions which have long employed juries in the penalty phase of potential capital cases. The number and type of cases in which such arguments should be legitimately considered by the state courts will be materially expanded or contracted depending upon whether the Ninth Circuit's position on *Ring* retroactivity is rejected or affirmed.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit opinion creates a split of authority with two federal circuit courts and the highest courts of five states.

The Nebraska Supreme Court has specifically considered the issue of *Ring* retroactivity and concluded that this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002) is procedural in nature and does not meet the requirements of *Teague v. Lane*, 489 U.S. 288 (1989) for retroactive application. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

The highest courts of Alabama, Arizona, Georgia and Nevada have reached the same conclusion. *See*, *Boyd v. State*, 2003WL22220330 (Ala.Crim.App. Sep. 26, 2003); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003),

cert.dismissed; *Head v. Hill*, 2003WL22282293 (Ga. Oct. 06, 2003); *Colwell v. State*, 59 P.3d 463 (Nev. 2002), *cert.pending*.

Courts of the Tenth and Eleventh Circuits have held that *Ring* is not retroactive. *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002); *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003). In addition, while not directly ruling, the Eighth, Seventh and Fifth Circuits have also indicated they would not apply *Ring* retroactively.[1]

Each of these state and federal circuit court rulings is in direct conflict with the Ninth Circuit's position upon *Ring* retroactivity. Such a conflict prevents the accurate and uniform enforcement of our federal constitution throughout this country.[2]

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[1] *Moore v. Kinney*, 320 F.3d 767, 771, fn 3 (8th Cir. 2003) ("The Supreme Court did not, and has not, expressly made the ruling in *Ring* retroactive. . . . Absent an express pronouncement on retroactivity from the Supreme Court, the rule from *Ring* is not retroactive."); *Whitfield v. Bowersox*, 324 F.3d 1009, 1012, fn 1 (8th Cir. 2003) (same); *Szabo v. Walls*, 313 F.3d 392, 398-399 (7th Cir. 2002) ("Unfortunately for Szabo, however, in order to apply *Apprendi* to capital sentencing, *Ring* first had to overrule *Walton v. Arizona*, [citation omitted]. Given *Teague*, it is *Walton* and not *Ring* that governs."); *In re Johnson*, 334 F.3d 403, fn 1 (5th Cir. 2003) (indicating that logical consistency would dictate no distinction between *Apprendi* and *Ring* retroactivity).

[2] E.g., the United States District Court for the District of Nebraska, following the Ninth Circuit majority's reasoning in *Summerlin*, recently concluded that *Ring* represents a rule of substantive law and thus has applied *Ring* retroactively to a judgment of conviction which became final in 1986. *Palmer v. Clarke*, ___ F.Supp. ___, 2003WL22327180, *35 (D.Neb., Oct. 9, 2003).

II. The Ninth Circuit's majority employs an erroneous characterization of *Ring* to create a nonexistent distinction between the Sixth Amendment right recognized in *Apprendi* and the Sixth Amendment right applied in *Ring*.

The Ninth Circuit having previously found *Apprendi* not to be retroactive,[3] the Ninth Circuit majority here attempts to create a distinction between the Sixth Amendment right recognized by this Court in *Apprendi* and the Sixth Amendment right applied by this Court to potential capital cases in *Ring*.[4]

Apprendi and *Ring* are not about two different and distinct Sixth Amendment rights.[5] They are about exactly the same Sixth Amendment right and have exactly the same impact upon capital and non-capital cases.[6]

In both *Apprendi* and *Ring* there existed under state law a fact which, if found, exposed an individual (already found guilty of a criminal offense) to greater punishment. In *Apprendi*, that fact was the nature of the guilty party's motivation for the offense. In *Ring*, that fact was whether a statutory aggravating circumstance was present with respect to the murder of which the defendant had already been found guilty. In both *Apprendi* and *Ring* this Court concluded that the Sixth Amendment entitled the guilty

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[3] *U.S. v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002).

[4] *Ring*, 536 U.S. at 588-589.

[5] *Ring*, 536 U.S. at 475.

[6] *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) ("[T]hat *Apprendi* announced a rule of criminal procedure forecloses Cannon's argument that *Ring* announced a substantive rule.")

party to a jury determination of the punishment-enhancing fact.

Contrary to the Ninth Circuit majority's assertion,[7] both *Apprendi* and *Ring* were about nothing else but "who decides" a fact significant under state law. Neither *Apprendi* nor *Ring* alter substantive state law which establishes the fact in question and the impact of that fact, if found, upon the punishment of the guilty party.

III. As the holdings of *Apprendi* and *Ring* recognize and apply the same Sixth Amendment right, both rulings should be afforded similar treatment on the question of retroactivity.

If the Sixth Amendment right recognized by this court in *Apprendi* and applied to potential capital cases in *Ring* is the same right, then it becomes relevant that every federal circuit court, including the Ninth, and the highest courts of seven states, Arizona, Colorado, Florida, Illinois, Kansas, Minnesota and New Hampshire have all concluded that this Court's holding in *Apprendi* is procedural in nature and is not entitled to retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989).[8]

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[7] 341 F.3d at 1107.

[8] *Sepulveda v. U.S.*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. U.S.*, 329 F.3d 77 (2d Cir. 2003); *U.S. v. Swinton*, 333 F.3d 481 (3rd Cir. 2003); *U.S. v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *U.S. v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. U.S.*, 305 F.3d 378 (6th Cir. 2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002); *U.S. v. Moss*, 252 F.3d 993 (8th Cir. 2001); *U.S. v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *U.S. v. Mora*, 293 F.3d 1213 (10th Cir. 2002); *McCoy v. U.S.*, 266 F.3d 1245 (11th Cir. 2001).

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The amici states believe these holdings represent a correct reading of this Court's intentions in *Apprendi*, *Ring* and *Teague*.

IV. The Ninth Circuit majority founds its position upon an interpretation of Arizona law which is directly contrary to a specific ruling of the Arizona Supreme Court.

The amici states have a strong interest in having their highest courts be the final arbiters of the substantive law of their states. The analysis of *Ring* retroactivity by the Ninth Circuit majority below ignores that fundamental principle of federalism.

In its attempt to distinguish the Sixth Amendment right applied in *Ring* from the Sixth Amendment right recognized in *Apprendi* the Ninth Circuit majority begins by taking upon itself a responsibility reserved to the state courts: It takes upon itself the responsibility to define substantive state law.

> In *Ring*, conversely, the substantive basis of Arizona's capital murder regime was at issue, so much so that *Ring* restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona.[9]

State v. Sepulveda, 201 Ariz. 158, 32 P.3d 1085 (Ariz.App. 2001); *People v. Bradbury*, 68 P.3d 494 (Colo.App. 2002), *rev.denied*, 2003WL1958429 (Colo.Sup.Ct. 2003); *Figarola v. State*, 841 So.2d 576 (Fla.App. 2003); *People v. De La Paz*, 204 Ill.2d 426, 791 N.E.2d 489 (2003); *Whisler v. State*, 272 Kan. 864, 36 P.3d 290 (2001); *Meemken v. State*, 662 N.W.2d 146 (Minn.App. 2003); *State v. Tallard*, 816 A.2d 977 (N.H. 2003). *See also, Teague v. Palmateer*, 184 Or.App. 577, 57 P.3d 176 (2002).

If *Ring* had altered the substantive law of Arizona, it would be the responsibility of the Arizona Supreme Court to declare the nature of that change to the substantive law of Arizona. In *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003), the Arizona Supreme Court did exactly the opposite. The Arizona Supreme Court specifically concluded that *Ring* did not alter the substantive law of that state.

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.[10]

It is not the place of the Ninth Circuit majority to substitute its judgment upon a question of substantive Arizona law for that of the Arizona Supreme Court.[11] Yet the Ninth Circuit majority did so and the product of that impermissible act became the lynchpin of the court's position on *Ring* retroactivity.

[9] 341 F.3d at 1107.

[10] *Towery*, 204 Ariz. at 392, 64 P.3d at 834.

[11] *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Gurley v. Rhoden*, 421 U.S. 200 (1975).

The amici states have a strong interest in preserving the right of their state courts to articulate the substantive law of their states. Thus, the process by which the Ninth Circuit majority ignored that fundamental concept of federalism in resolving this case is of considerable concern to the states.

V. A second generation of *Ring* claims are already being litigated in the state courts.

The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring*, not only in former judge-sentencing states but in states which have historically employed juries to resolve questions of penalty. Many of these claims are arising in the context of collateral attacks upon otherwise final judgments of conviction.[12]

This Court resolving the *Ring* retroactivity issue would significantly impact the number and types of cases in which the state courts should legitimately consider such arguments.

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[12] *Goodin v. State*, 2003WL21805386, *7 (Miss. 2003) (state postconviction proceeding attempting to raise a *Ring*-based claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Russell v. State*, 849 So.2d 95, 146 (Miss. 2003) (same); *West v. State*, 2003WL22220502, *1 (Ala.Crim.App. 2003) (postconviction action alleging indictment against prisoner was fatally defective under *Ring* because it did not identify any aggravating circumstances). See also, *U.S. v. Mack*, 343 F.3d 929, 936 (8th Cir. 2003) (Claim that *Ring* requires submission to the jury of sentencing enhancements that do not raise the maximum sentence.)

CONCLUSION

The Court should grant a writ of certiorari in this case.

The amici states and their respective judiciaries across this country await a dispositive resolution of the conflict created by the Ninth Circuit majority in this case.

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